Supreme Court, U. S.
FILED
MAY 24 1974
MICHAEL RODAK, JR., CLERK

No. 73-662

In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS ON THE JURISDICTIONAL ISSUES

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BRIEF FOR PETITIONERS ON THE JURISDICTIONAL ISSUES

This Brief is filed pursuant to the Court's request of April 2, 1974, that supplemental briefs be filed "on the issues of (1) the jurisdiction of the District Court, (2) exhaustion of remedies, and (3) the propriety of a federal district court enjoining a pending court-martial proceeding."

The petitioners have not yet filed their brief on the merits. Since we believe, for the reasons set forth below, that the district court should not have entertained this suit, this brief discusses only the foregoing issues. If the Court does not dispose of this case this Term, however, we shall then promptly file our brief on the merits.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 9–13) is reported at 481 F.2d 613. The initial opinion of the district court (Pet. App. C, pp. 15–18) and its opinion on rehearing (Pet. App. D, pp. 19–22) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 14) was entered on July 19, 1973. The petition for a writ of certiorari was filed on October 16, 1973, and was granted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The relevant facts have been stipulated (Pet. App. E, pp. 23–25) and are set forth in the opinion of the court of appeals (Pet. App. A, pp. 9–11). Captain Councilman is an Army officer serving on active duty at Fort Sill, Oklahoma (Pet. App. E, p. 23). After receiving information from a confidential informant that Councilman was using marihuana at his off-post apartment in Lawton, Oklahoma, the Army's Criminal Investigation Detachment ("CID") began an investigation by introducing Councilman at an off-post party to Specialist Four Glenn D. Skaggs, an enlisted man who was an undercover agent for the CID (Pet. App. A, p. 10; Pet. App. E, p. 25).

Skaggs, who had participated in numerous drug investigations, was then using the name Danny Drees and was introduced to Captain Councilman as a clerk-typist in the Army Training Center at Fort Sill (Pet. App. A, pp. 10–11; Pet. App. E, p. 25). Shortly

thereafter, Councilman allegedly transferred small amounts of marihuana to Skaggs on two separate occasions, once by gift and once by sale (Pet. App. E, p. 23). At the time of the offense, Councilman was off post, off duty, and not in uniform (Pet. App. E, p. 24); Skaggs also was not in uniform and ostensibly was off duty (Pet. App. A, p. 11). Councilman was apprehended by civilian authorities, and a search of his off-post apartment revealed additional marihuana (Pet. App. A, p. 11). He was taken into civilian custody, and later remanded to the military authorities.

On March 27, 1972, court-martial charges were preferred against Councilman, alleging that he violated Article 134 of the Uniform Code of Military Justice[1] by wrongfully selling, transferring and possessing marihuana.[2] Following an investigatory hearing conducted pursuant to Article 32 of the Uniform Code, 10 U.S.C. 832, these charges were referred to a general court-martial for trial. (Pet. App. E, pp. 23–24).

At a preliminary hearing held on June 27, 1972, pursuant to Article 39(a), 10 U.S.C. 839(a), Councilman moved to dismiss the charges on the ground that the military authorities lacked jurisdiction because his offenses were not "service connected" under

[1] That Article, 10 U.S.C. 934, prohibits, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The constitutionality of this provision is pending before the Court in *Secretary of the Navy* v. *Avcech*, No. 72-1713, and *Parker* v. *Levy*, No. 73-206, argued on February 20, 1974.

[2] There was also a charge of wrongful use of marihuana, which was dismissed after the pre-trial investigation (Pet. App. E, pp. 23–24).

O'Callahan v. *Parker,* 395 U.S. 258. After an evidentiary hearing, the presiding military judge denied the motion (Pet. App. E, p. 24) and scheduled the court-martial for July 11, 1972.

On July 5, 1972, Councilman brought this action in the United States District Court for the Western District of Oklahoma to enjoin his impending court-martial.[3] He argued that, since the military courts lacked jurisdiction over the alleged offenses, he "[would] suffer great and irreparable damage in that he [might] be deprived of his liberty without due process of law, if the Court-Martial Proceedings are permitted on July 11, 1972."[4] The next day, after a hearing on the service-connection issue, the district court permanently enjoined the military authorities from proceeding with the court-martial (Pet. App. C, pp. 15–18).

The court of appeals affirmed (Pet. App. A, pp. 9–13), holding that the alleged offenses did not meet the tests for service-connection set forth in *O'Callahan* v. *Parker,* 395 U.S. 258, and elaborated in *Relford* v. *United States Disciplinary Commandant,* 401 U.S. 355. The court ruled that only one of the factors enumerated in these two opinions pointed to "service-connection" in this case—the "factor relat[ing] to the rank of the persons involved in the incident or the fact that both were servicemen" (Pet. App. A, p. 12).

[3] He named as defendants the Secretary of Defense, the Secretary of the Army, and the Commanding General and Staff Judge Advocate of Fort Sill.

[4] The Affidavit in Support of Motion for Temporary Restraining Order alleged that "plaintiff herein has been arrested and placed in custody * * * pending a Court-Martial * * *."

See *Relford, supra,* 401 U.S. at 368 (factor "f"). It found this insufficient to sustain court-martial jurisdiction. The court also concluded that Captain Councilman's possession and distribution of marihuana "affect[ed] military discipline no more than commission of any crime by any serviceman" (Pet. App. A, p 13).

The jurisdictional issues discussed in this brief were not raised in or discussed by either the district court or the court of appeals.

SUMMARY OF ARGUMENT

The district court had no jurisdiction to review court-martial proceedings other than by writ of *habeas corpus.* Article 76 of the Uniform Code of Military Justice makes the actions of courts-martial conclusive upon civilian courts except insofar as the Constitution, Art. I, Sec. 9, requires the allowance of *habeas corpus.*

In any event, the District Court's enjoining of a pending prosecution in the military justice system violated established principles of law. *Younger* v. *Harris,* 401 U.S. 37. Congress has assigned responsibility for military justice in the first instance to the court-martial system, and considerations of comity require that that system be allowed to function. *Parisi* v. *Davidson,* 405 U.S. 34, 51. The special expertise of military courts in determining questions of "service-connection" should be brought to bear before civilian court review occurs. In addition, abstention from interference with ongoing prosecutions conserves scarce judicial resources, as the outcome of the military proceedings may make review unnecessary.

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Finally, the accused in this case failed to exhaust any of the many remedies available to him in the military justice system. This failure also should have precluded the district court from granting relief. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51.

ARGUMENT

THE DISTRICT COURT IMPROPERLY ENJOINED THE COURT-MARTIAL PROCEEDING.

A. CIVILIAN COURTS HAVE JURISDICTION TO REVIEW COURT-MARTIAL PROCEEDINGS INVOLVING MILITARY PERSONNEL ONLY BY WRIT OF HABEAS CORPUS.

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876, provides that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter * * * are final and conclusive" and "all action taken pursuant to those proceedings are binding upon all * * * courts * * * of the United States * * *."[5] As argued in the government's Supplemental Brief in

[5] That Article, 10 U.S.C. 876, provides in full:

"The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

Secretary of the Navy v. *Avrech*, No. 72-1713, on which we rely here, the legislative history of Article 76 shows that Congress intended to limit civilian court review of court-martial proceedings to petitions for *habeas corpus*.[6] See, *e.g.*, S. Rep. No. 486, 81st Cong., 1st Sess., p. 32; H. Rep. No. 491, 81st Cong., 1st Sess., p. 35. In permitting *habeas corpus* as the sole exception to the finality of actions within the military court system, Congress recognized the special constitutional status of that writ under the Suspension Clause.[7] There is, of course, no corresponding constitutional basis for other remedies employed when personal liberty is not at stake (Supp. Brief in *Avrech*, pp. 5–7).

The explanation for the finality provision of Article 76 is the comprehensive appellate procedures within the military court system which the Uniform Code of Military Justice provided. See, *e.g.*, Articles 64–69, 10 U.S.C. 864–869. The ultimate responsibility for protecting the rights of accused servicemen (except for federal court review by writ of *habeas corpus*) has been placed in the Court of Military Appeals, a civilian judicial body with a specialized understanding of military problems. See *Noyd* v. *Bond*, 395 U.S. 683, 694. Below this court there are military appellate tribunals which insure that court-martial convictions of

[6] We are serving a copy of our Supplemental Brief in *Avrech* upon counsel for respondent.

[7] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." United States Constitution, Art. I, § 9, cl. 2.

members of the Armed Forces will be fully and thoroughly reviewed.

These provisions for appellate review show that Congress intended to create an extensive and independent judicial system for the administration of military justice. Federal court review was to be allowed only to the extent that the Constitution compelled the allowance of the writ of *habeas corpus* (see Supp. Brief in *Avrech*, pp. 7–9).

Since Congress intended to preclude civilian court review of court-martial convictions except in the limited situation where *habeas corpus* is available, *a fortiori* Congress intended to preclude such review before the court-martial has even taken place. As shown below (pp. 11–17), permitting civilian court intervention in the military justice system at this preliminary stage would improperly interfere with the carefully formulated procedures Congress has selected for the conduct of the military justice system, and would also depart from a number of settled principles governing the relationship between the federal courts and other governmental agencies.[8]

[8] Even if Councilman had sought *habeas corpus*, the writ could not have been granted because he was not "in custody." He was not incarcerated or restricted to post, nor was his liberty restrained in any way. He is presently serving in the Officer Student Battalion at Fort Sill, and has been permitted to go on leave. Although he cannot be released from active duty until the disposition of the charges against him, he has not sought such release, and we have been advised that he is a reserve officer who has volunteered to remain on duty indefinitely.

The only other disabilities that Councilman has suffered as a result of the charges against him have been that his security clearance and "flight status" were suspended, and his records were "flagged," rendering him ineligible for favorable personnel actions, such as promotion or transfer. These conditions do not constitute a restraint upon his liberty that would place him in custody, and they could have been continued in any event, regardless of the outcome of the proceedings. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 92–95; *Gilligan* v. *Morgan*, 413 U.S. 1, 5–12.

Councilman's status was essentially that of an indicted person at liberty awaiting trial. This status alone has never been held sufficient to support *habeas corpus* jurisdiction. See *Johnson* v. *Hoy*, 227 U.S. 245, 247; *Hensley* v. *Municipal Court*, 411 U.S. 345, 353.

B. THE DISTRICT COURT'S ACTION WAS AN IMPROPER INTERFERENCE WITH A PENDING COURT-MARTIAL PROCEEDING

1. The action of the district court was contrary to the well-established principle that federal courts will not enjoin prosecutions pending in other jurisdictions except in limited and unusual circumstances.[9] *Younger* v. *Harris*, 401 U.S. 37; *Dombrowski* v. *Pfister*, 380 U.S. 479; *O'Shea* v. *Littleton*, No. 72–953, decided January 15, 1974. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475. Although *Younger*, *Dombrowski* and *O'Shea* involved injunctions against state prosecutions, their reasoning has been correctly applied to court-martial

[9] The present case is one of several recent cases in which district courts have enjoined pending courts-martial. *E.g.*, *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.); *McLucas* v. *DeChamplain*, D.D.C., No. 1863–73, decided November 13, 1973, pending on the government's appeal to this Court, No. 73–1346; *contra*, *Sedivy* v. *Richardson*, 485 F. 2d 1115 (C.A. 3), petition for certiorari pending, No. 73–6030; *Dooley* v. *Ploger*, C.A. 4, No. 73–1900, decided February 12, 1974.

proceedings.[10] See, *e.g.*, *Sedivy* v. *Richardson*, 485 F. 2d 1115 (C.A. 3), petition for certiorari pending No. 73-6030; *Levy* v. *Corcoran*, 389 F. 2d 929 (C.A.D.C.), certiorari denied, 389 U.S. 960.

This Court's opinion in *Younger* makes clear that the irreparable harm which alone justifies federal court injunction of pending proceedings must be something more than " 'that incidental to every criminal proceeding brought lawfully and in good faith.' " 401 U.S. at 49. Councilman has never suggested that his court-martial is being brought in bad faith or for the purposes of harassment.

[10] In *Noyd* v. *Bond*, *supra*, 395 U.S. at 693-694, the Court quoted with approval a passage from *Gusik* v. *Schilder*, 340 U.S. 128, 131-132, in which Justice Douglas, speaking for a unanimous Court, "explained some of the important reasons which require civilian courts to respect the integrity of the military court system that Congress has established":

> An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. * * * The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

Nor is there any other basis in the present case for a finding of "irreparable injury," which this Court has held must be "great and immediate" in order to justify interference with the jurisdiction of other judicial systems. See, *e.g.*, *O'Shea* v. *Littleton*, *supra*; *Fenner* v. *Boykin*, 271 U.S. 240; *Douglas* v. *City of Jeannette*, 319 U.S. 157. The fact that Councilman may have to stand trial by court-martial is not sufficient to justify injunctive relief, even though he raises claims of constitutional dimension. *Younger*, *supra*, 401 U.S. at 46, 49. Nor is he irreparably harmed because he may have to stand trial even though a federal court eventually might rule that his offense was not "service connected." Cf. *Gusik* v. *Schilder*, 340 U.S. 128. Indeed, not even the possibility of confinement while a defendant is appealing shows irreparable injury. Otherwise, the rule against injunctions of pending prosecutions would be substantially emasculated, since many defendants face the prospect of confinement if convicted. CF. 28 U.S.C. 2254(c); *Gusik*, *supra*, 340 U.S. at 129-133.

Moreover, even if Councilman's *O'Callahan* claim is rejected at all levels of military review, federal *habeas corpus* will then be available to test any jurisdictional question he presents. *Id.* at 133. Should a federal court vindicate his challenge at that time, the military charges against him would be dismissed and his conviction vacated.

2. The district court's injunction also violated the principle of comity, because it constituted an impermissible interference by a civilian court with the

military court-martial system. Whether or not Councilman's argument is termed "jurisdictional," the district court should have permitted the orderly processes of the military court system to be completed to avoid needless friction with that system and to have the facts fully developed and the law interpreted by the specialized tribunals which have been assigned the responsibility in the first instance for the administration of military justice. See *Parisi* v. *Davidson,* 405 U.S. 34, 51 (Douglas, J., concurring); *Sedivy* v. *Richardson,* 485 F. 2d 1115, 1119–1121 (C.A. 3).

Pursuant to its constitutional power "to make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, Congress has established special courts for military criminal cases. *Burns* v. *Wilson,* 346 U.S. 137. In the exercise of this power, Congress

> has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces. [*Noyd* v. *Bond, supra,* 395 U.S. at 694.]

This precept against non-interference with the continuing proceedings of military courts applies *a fortiori* to the lower federal courts. *Sedivy* v. *Richardson, supra,* 485 F. 2d at 1117. As discussed earlier (pp. 6–8), the restriction of federal court review to the

constitutionally mandated writ of *habeas corpus* reflects a proper respect for the integrity of the military court system. *Noyd* v. *Bond, supra,* 395 U.S. at 693–694; *Gusik* v. *Schilder, supra,* 340 U.S. at 131–132; *Parisi* v. *Davidson,* 405 U.S. 34, 41, n. 7.

It was particularly inappropriate for the district court to have prevented the military courts from fully developing the facts relating to the exercise of their jurisdiction. Some of the facts bearing on "service connection" were presented at the Article 32 hearing, after which the charges against Councilman were referred to a general court-martial. After Councilman's challenge to court-martial jurisdiction at the Article 39(a) preliminary hearing, witnesses testified with regard to a few contested issues (such as whether or not the undercover agent who sold marihuana to Councilman held himself out as an enlisted man). But the court-martial was not allowed to develop the facts thoroughly at a plenary trial.[11] Nor was the Court of Military Review or the Court of Military Appeals allowed the opportunity to apply its expertise to the facts or to order rehearings on important evidentiary questions (Articles 66 and 67, 10 U.S.C. 866, 867).

Before deciding whether a particular crime is service-connected, the civilian courts should have the benefit of the views of the appellate military courts. As the Fourth Circuit observed in *Dooley* v. *Ploger,*

[11] The stipulation of facts in the district court (Pet. App. E, pp. 23–24), to which Councilman agreed solely for the purpose of presenting the *O'Callahan* issue, is sketchy and incomplete, and illustrates the need for civilian courts to have before them records as complete as possible before ruling on jurisdictional issues.

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supra, slip op. at 20–21 (holding that military remedies must be exhausted before a federal court can hear a challenge to court-martial jurisdiction under *O'Callahan*):

> Resolution of the *O'Callahan* questions * * * depends for the most part on the fact-finding process—which will determine the circumstances under which any offense has been committed—and on a judgment of the impact of the offenses on the combat effectiveness of the armed forces. Expert understanding of the special circumstances of military life obviously would influence what facts are found from the evidence and what significance is attached to them. * * *
>
> * * * Dooley's tendered stipulation falls short of providing the certainty that is necessary in order to arrive at an informed judgment as to the effect that *O'Callahan* has on his case. The proper tribunal to determine the operative facts is a military tribunal which also has the expertise to express a view, once the operative facts are developed, of the effect of the commission of the crime, if guilt is found, on the morale and efficiency of future operations of the military. * * *

The following footnote in *Noyd* v. *Bond* has been relied upon to support the argument that jurisdictional challenges are an exception to the exhaustion requirement (395 U.S. at 696, n. 8):

> Petitioner contends that our decisions in *Toth* v. *Quarles,* 350 U.S. 11 (1955); *Reid* v. *Covert,* 345 U.S. 1 (1957); and *McElroy* v. *Guagliardo,* 361 U.S. 281 (1960), justify his position that exhaustion of military remedies is not required in this case. The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected wth the military, and it is true that this Court there vindicated complainants' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us.

Each of the cases cited, however, involved challenges to the power of courts-martial to try civilians. That is an issue for which the military courts have no special competence and which is particularly appropriate for the civilian courts to decide. Moreover, none of those cases required a development of facts in order to determine the legal issue they presented: Whether civilians were subject to the jurisdiction of courts-martial. The resolution of that issue involved only traditional constitutional analysis and would not be aided by the application of the expertise of military courts. In the instant case, by contrast, the expertise of military courts would have been useful, indeed necessary, both for a proper development of the facts and for an informed interpretation of the record in light of *O'Callahan.* Cf. *McKart* v. *United States,*

395 U.S. 185, 197–199; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130–132.[12]

Apart from the special circumstances of those cases, ordinarily even a challenge to the jurisdiction of a tribunal does not justify an exception to the rule against federal court injunctions against the proceedings of another adjudicatory system. *Levy* v. *Corcoran*, 389 F. 2d 929, 930–931 (C.A.D.C.); cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49–52. In these circumstances, it is not surprising that several courts of appeals have rejected the contention that the footnote in *Noyd* v. *Bond* indicates that federal courts may enjoin a court-martial proceeding on the claim that the offense is not service-connected.

[12] See similarly, Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan* v. *Parker*, 54 Minn. L. Rev. 1, 50–52 (1969):

> It is submitted that, to permit a serviceman to use habeas corpus prior to exhaustion is to discount unjustifiably the availability and value of the fairly complete military appellate and collateral review procedure provided by the UCMJ. * * * The issue of "service-connection" is especially suited to the expertise of military courts and the United States Court of Military Appeals; this is not so, as Justice Harlan points out, in the purely civilian cases. By requiring exhaustion, the federal district courts, before having to tackle the question of "service-connection," will in many cases have before them expert judgment of several echelons of military tribunals and often that of the Court of Military Appeals. While such determinations are not binding on the civilian federal courts in habeas corpus actions, they nevertheless provide helpful guidelines. Moreover, such an approach will to a great extent obviate the problems inherent in interpreting "a legal tradition which is radically different from that which is common in civil courts" [citing *Noyd* v. *Bond*].

E.g., *Sedivy* v. *Richardson*, *supra*; *Dooley* v. *Ploger*, *supra*; *Mascavage* v. *Schlesinger*, C.A.D.C. No. 73–1446, decided March 1, 1974; contra, *Cole* v. *Laird*, 468 F. 2d 829 (C.A. 5). Cf., contra, *Hemphill* v. *Moseley*, 443 F. 2d 322 (C.A. 10).

Permitting civilian courts to enjoin pending court-martial proceedings would improperly and unnecessarily disrupt the sound functioning of the military justice system that Congress has provided for the armed services. The delays occasioned by such litigation would make trial by court-martial more difficult and perhaps impossible. If and when the court-martial finally is held, it may discover that witnesses and even military counsel are scattered to new assignments in distant places.[13]

Most importantly, such intervention by civilian courts might become unnecessary if the court-martial proceeding were permitted to follow its normal course. An acquittal at trial or a reversal at the appellate stage would eliminate the need for any civilian court review. See *Gusik* v. *Schilder*, *supra*, 340 U.S. at 131–132; *Gosa* v. *Mayden*, 413 U.S. 665, 711–712 (Marshall, J., dissenting). Cf. *Fein* v. *Selective Service System*, 405 U.S. 365, 376.

[13] Additionally, if federal courts can delay court-martials while conducting evidentiary hearings and appeals, the eventual military trial, if permitted, and subsequent appeals would duplicate much of the ground already covered in the federal proceedings. This repetition could be avoided by allowing full disposition of a case within the military before the *O'Callahan* issue is raised before a federal court.

C. THE DISTRICT COURT SHOULD HAVE DISMISSED THE SUIT BECAUSE RESPONDENT HAD NOT EXHAUSTED HIS REMEDIES WITHIN THE MILITARY SYSTEM.

Even if, contrary to our submission, the district court had authority to enjoin a pending court-martial on the claim that the offense was not service-connected, the court should have dismissed this suit because Councilman had not exhausted his remedies within the military justice system.

When Councilman sought relief in the district court, there were numerous remedies available to him under the Uniform Code of Military Justice through which he could have fully litigated his claims. He could have attempted to establish his innocence at a trial on the merits, at which the facts relating to both his guilt and service-connection, could have been fully developed. If he was convicted, the case would have been automatically reviewed by a staff judge advocate (Article 61, 10 U.S.C. 861) and by the convening authority (Article 64, 10 U.S.C. 864). If he was sentenced to dismissal from the service or confinement for a year or more, review on the merits and on the jurisdictional issues would then have been available from the Court of Military Review (Article 66, 10 U.S.C. 866) and, possibly, from the Court of Military Appeals (Article 67, 10 U.S.C. 867). See *Gusik* v. *Schilder*, 340 U.S. 128; *Noyd* v. *Bond*, 395 U.S. 683.

Councilman also could have sought direct relief on the jurisdictional issue from the Court of Military Appeals without going to trial on the merits. This Court

has recently noted the power of the Court of Military Appeals to grant extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a). *Noyd* v. *Bond*, *supra*, 395 U.S. at 695. Councilman's failure to exhaust these remedies should have precluded the district court's action, under "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51. Although the holdings of the Court of Military Appeals with regard to the "service connection" of various kinds of drug offenses suggest that such a challenge to court-martial jurisdiction would probably have been unsuccessful,[14] that fact does not excuse the failure to exhaust remedies. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

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[14] See, *e.g.*, *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275. The Court of Military Appeals, however, has always been willing to consider and adjudicate claims of lack of service-connection, as shown by the extensive list of cases in *Relford* v. *United States Disciplinary Commandant*, 401 U.S. 355, 358–359, n. 8.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed and the cause remanded to the district court with directions to dismiss the complaint.

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MAY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974